***United States Court of Appeals***

***for the Second Circuit***


# APPELLANT'S BRIEF

ORIGINAL

75-1435

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P/S

# United States Court of Appeals

**For the Second Circuit.**

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UNITED STATES OF AMERICA,

*Appellee,*

-against-

YUK CHOI CHUNG, a/k/a DAVID CHAN,

*Appellant.*

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## BRIEF ON BEHALF OF APPELLANT CHUNG

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UNITED STATES OF AMERICA,

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Docket No. 75/1435

STATEMENT PURSUANT TO RULE 28(3)

PRELIMINARY STATEMENT

This is an appeal from a judgment of conviction rendered on December 18, 1975 in the United States District Court for the Southern District of New York (Tenney, J.) convicting Appellant Chung after trial of conspiring to import quantities of heroin in violation of Section 812, 841(a)(1), 841(b)(A), 951(a)(1), 960 (a)(1), 960 (b)(1), Title 21 U.S.C. Appellant was sentenced to a five year term of imprisonment on the condition that he be confined to an institution for three months with the execution of the remainder of the sentence suspended. Appellant was additionally placed on a special parole for four years and nine months.

## QUESTIONS PRESENTED

1. Whether the Government's deliberate use on Appellant's cross examination of a statement which was obtained from him in violation of his right to counsel and of which his counsel had no notice of its existence, deprived Appellant of his due process right to a fair trial.

2. Whether the taped conversations between Lam and Appellant should be suppressed as violative of the Fourth Amendment proscription against unreasonable search and seizures since the recordings were made without the consent of these defendants and at a time when both parties enjoyed a reasonable expectation of privacy.

3. Whether the trial court committed reversible error by permitting the jury to have a copy of the tape transcripts while they were deliberating on a verdict.

4. Whether the refusal of the trial court to sever the possessory charge lodged only against the co-defendant Ganoza from the conspiracy count which involved all the defendants deprived appellant of his due process right to a fair trial.

## STATEMENT OF FACTS

Appellant and his two co-defendants, Jimmy Lam (Lam Lek Chong) and Francisco Li Ganoza, were charged with conspiring to import quantities of heroin into the United States from Hong Kong and intending to distribute said drug in violation of Sections 812, 841 (a) (1), 841 (b) (1) (A), 951 (a) (1), 960 (a) (1), 960 (b) (1), Title 21 U.S.C. Co-defendant Ganoza was additionally charged with the unlawful possession of a quantity of heroin with intent to distribute same.

Before the commencement of the trial, Appellant made a motion to sever the second count of the indictment which referred only to the co-defendant Ganoza, on the ground that it was a prejudicial joinder (min. of 10/8/75, pp. 15-18). At one point, the Court decided to grant this application for a severance (id. at p. 27). However, the Court thereafter changed its ruling and stated that if a threat of actual prejudice resulted from trying the two counts together, the Court could then sever the second count and instruct the jury before any damage was done. (id. at pp. 32, 38)

### GOVERNMENT'S CASE

PATROLMAN FRANK MING and DETECTIVE HERBERT WRIGHT were both employed by the New York City Police Department

and were assigned to the New York Drug Enforcement Task Force to do undercover work in narcotic matters (149-50).*

On January 24, 1974, Ming went to see the Defendant Lam at his Oriental Travel Agency in order to buy approximately four pounds of heroin. Lam told the officer that the heroin would cost between $25,000 and $28,000 per pound and that he would introduce Ming to a friend who would make the necessary arrangements (153). Lam then stated that he could get heroin at $2000 per pound in Hong Kong and further suggested that he could send a lady to Hong Kong to bring it back (154).

The next evening, Ming met the "fat guy" (Robert) pursuant to arrangements made by Lam. Robert gave him a sample of heroin which was contained in a cigarette package (166). When Robert pressed the officer to purchase one and a half pounds of heroin from him for $42,000, Ming responded that he would first have to talk to his partners. On the morning of January 30th, Officer Ming and Detective Wright purchased this heroin from Sonny and Robert, but paid the men only $28,000, owing them a balance of $14,000 (167-168). The two officers later gave Lam $1000 to put towards the balance and thanked Lam for telling the men to trust them for the extra one-half pound (171). Lam again at this time suggested that they purchase the heroin in Hong Kong (172).

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*Numerical references are to the pages of the trial transcript.

During the months of February and March, several meetings were held to discuss the importation of heroin from Hong Kong. At these meetings, the officers held themselves out as pimps and dealers in narcotics. They wanted to pose as tough guys in order to frighten the dealers into delivering the "goods" (175, 392-93).

Specifically, on February 14th, Lam told the officers that if they would agree to go to Hong Kong and purchase 100 pounds of heroin, he would introduce them to his connection who would show them how to smuggle it back into the United States. This heroin would cost them about $2000 to $3000 per pound (176-77).

On February 22nd, another discussion was held regarding the Hong Kong deal. Lam at this time told the officers that once the heroin arrived in the United States, they would have to pay for it. Lam additionally asked them for $5000 to $6000 to help pay the expenses of sending a man to Hong Kong to set up the deal (177-78).

At a subsequent meeting on March 5th, Lam told the officers that his contact wanted all the money in Hong Kong and that the heroin would now cost them between $3000 and $5000 per pound.

On March 7th, the three men decided that the officers would pay for one-half of the heroin in Hong Kong and would pay

the balance upon its arrival in the United States. The people in Hong Kong would be expected to pack it and ship it to the United States for them (181).

It was on March 3th that Lam informed the officers he had found a way to get the heroin into the United States. Lam explained that he had a friend who owned an import and export business in Virginia and Hong Kong. According to Lam, this friend would pack the heroin in soybean cans, box it, and ship it to Virginia (182-83). Ming admitted that it was Detective Wright who first asked Lam if he knew anyone in the import and export business. Lam did not bring up this subject first (367).

On March 12th, Officer Ming and Detective Wright met Appellant for the first time. Lam introduced Appellant as his friend in the importing business and told them that as Appellant did not speak or understand English very well, he would act as an interpreter. The two officers did not speak or understand Chinese (185, 384, 936). The Government tapes show that a discussion ensued among the men regarding ways of getting the heroin into the United States (185).*

*This transcript reflects the following: Initially, Appellant asked Lam to tell the officers that he came to the United States from China and was here for business. Instead, Lam told the officers "Yeah, got import-export firm, and he got a lot of connections, you know." (transcripts dated 3/12/74, pp. 3-4) Lam without consulting Appellant thereafter told the officers that he and David were not very big in this, but they were able to bring the "stuff" (id. at p. 7). Appellant (continued)

On March 19th, Appellant was present at another meeting. Lam told the officers that Appellant intended to leave for Hong Kong in a few days to set up the heroin deal (219). Appellant would first meet Lam's connection in Hong Kong and then would start preparing his canned goods (220). After the officers arrived in Hong Kong, they would receive a sample of the heroin in order to determine whether it was allright (219). The tape recording of this particular conversation was also played before the jury.*

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(continued) at another point instructed Lam to tell the officers "You tell them, we never did this before, this is first time" (id. at p. 31). When Lam talked to Appellant about the proposed deal, Appellant told him "this cannot be done, because we haven't found a way" (id. at p. 32). Lam thereafter told the officers that Appellant said "shipment is no problem" when in fact Appellant made no such statements (id. at p. 47). Finally, after much discussion, Appellant directs Lam to tell the officers "Let's go back and think it over" (id. at pp. 74, 79).

*Appellant at this time instructed Lam to tell the officers "We are all new to this. I am not saying we have been dealing, or ever deal before. Therefore, I myself have to go down to investigate, then meet again. Furthermore, whether the men are trustworthy or not" (transcripts of 3/19/74, p. 13). Lam falsely translated this statement and told the officers "He [Appellant] says things have been change in Hong Kong you know recently" (id. at p. 13). Appellant at another point instructed Lam to tell the officers "We cannot promise that we can buy the stuff" (id. at p. 20). Lam, however, told the officers, there is no problem with the "stuff" (id. at p. 21). Appellant also explained to Lam that they did not have the experience in this area and that buying and packing the "stuff" was a problem (id. at p. 31). When Lam asked Appellant whether he would agree to do 100 pounds, Appellant responded "I am telling you know, we do not dare to say agree or no. We have to look at the situation on both sides. Do you dare to guarantee that you can buy 100 pounds?" (id. at p. 51) Appellant further stated that a question remained as to whether his brother was willing to (continued)

On April 9th, Lam gave the officers the itinerary they should follow in Hong Kong, and suggested that they stay at the Hyatt Regency Hotel where they could all meet (270-71). Lam explained that Ming would be in a room with him, while Wright would be in another room with Appellant's brother. The heroin would be delivered to Wright's hctel where Wright would examine it to determine if it was satisfactory. He would then call Ming, who would give the money to Lam. He in turn would take the money to the connection (271).

Finally, on April 15th, Ming and Wright arrived in Hong Kong and registered at the Hyatt Regency Hotel (278). The next evening both Appellant and Lam came to their hotel room. Lam told the officers that he was still trying to get the price of heroin down from the "manufacturer" and would need $10,000 to $15,000 for his expenses. The officers told him that they would first have to talk to "Johnny," who was their fictitious boss (280).

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(continued) participate and whether there are any big problems (id. at p. 56). To this Lam responded in Chinese "For the sake of the money they will do it" (id. at p. 51). At one point in their conversations, Appellant states "Tell him definitely I'll do it. Definitely do it one time" (id. at p. 73). Finally, Appellant declares "Everything has to wait until I go back and see. All we talk today is empty talk" (id. at p. 88). Whereupon, Appellant instructs Lam that if he calls and says it is impossible, Lam should not come to Hong Kong (id. at p. 97).

On April 19th, Appellant telephoned Ming and told him that he and Lam would come to the hotel later that day* (287). Accordingly, on this same day, Appellant and Lam came to their room where a discussion ensued about the requested $15,000 and the price of heroin (288).

On April 20th, the officers informed Lam that Johnny would not give up any more money until they actually saw the narcotics (292, 656). Lam said that he would attempt to arrange the deal anyway (656).

On the morning of April 21st, Appellant telephoned to state that he would be at the hotel at 4:00 p.m., but he never appeared ** (668). That evening Lam came to the hotel alone and gave them a

*During the voire dire concerning the admissibility of this telephone conversation, it was ascertained that Ming had only been in Appellant's company on three different times. Appellant, on these occasions, had never entered into any extended conversation with him in English and the officer had never before spoken to him on the telephone. Ming acknowledged that people do not always sound the same on the telephone as they do in person. Hence, he did not know whether in fact it was Appellant on the telephone. He was only told by that person on the phone that it was David Chan. Despite this, the Court overruled Appellant's objections to the admissibility of this phone call (283-286).

**On voire dire of Detective Wright, it was ascertained that whenever Wright met Appellant, they would both speak in English (661-665). When asked to give an estimation regarding the number of times that Appellant had spoken in English, Wright replied "I wouldn't say it was very much and then again I wouldn't say it was very little" (665). Although he had never before spoken to Appellant on the telephone, he claimed that he could recognize the voice as that of Appellant (666-667).

sample of a brown rock substance which was contained in a cigarette wrapper (302). Lam told the officers that he would first sell them 10 pounds at $4600 per pound to see if the deal would go through (307).

On April 22nd, Lam told Detective Wright to go to the Sun Ya Hotel to meet Francisco Li who would have 10 pounds of heroin. Wright could then sample the heroin and if it was allright, he would telephone Ming who would give the money to Lam. Lam then said that he wanted $10,000 up front for his deal and when the officers refused to comply with this request, Lam lowered the figure to between $5000 and $7000. After much discussion, the officers told Lam that they would not front any more money (321). At 3:00 a.m., someone calling himself David Chan telephoned the officers and said that Lam was very angry because the deal did not go through. Accordingly, the two officers returned to the United States (321-22).

Two weeks later, on May 3rd, Detective Wright telephoned Lam and told him that they had to leave Hong Kong because the Hong Kong Police had knocked on their door and were asking questions. Because they got scared, they returned to the United States (700). Wright then told Lam to get in touch with Robert and Sonny as they

were interested in purchasing five pounds of heroin (701). On May 7th, Lam told the officers that Sonny would meet them the next day (711).

On May 8th, Sonny told them that his connection wanted $40,000 front money for the five pounds of heroin. Wright informed Sonny that they would not front any money and would pay the full amount when the heroin was delivered (727). Therafter, Sonny told them that the heroin had already been sold and that he would have to find them another connection (734).

It was only after extensive negotiations that the officers finally purchased some heroin on May 30th, 1974. This heroin was taken from the Defendant Ganoza's apartment and provided the basis for count two of the indictment (802).

At the conclusion of the Government's case, Appellant again moved to sever the second count of the indictment on the ground that his client was not charged with either the possession or sale of heroin (1318). Appellant claimed that there was no factual basis to establish that this heroin emanated from Hong Kong and further that this transaction took place after Appellant had abandoned the conspiracy (1337). The Court denied the motion.

APPELLANT'S CASE

Appellant, 37 years of age, testified that he was married and the father of two children (1392). He and his family presently live in Queens (1398). According to Appellant, he is a college graduate and taught Chinese literature in a high school in Canton (1390). When he was in Hong Kong during the period from 1965 to 1967, he also wrote many novels* (1395-1396).

In November of 1973, a friend introduced him to Lan and said that Lam was a travel agent from whom he could purchase tickets (1398). Consequently, in November of 1973, Lam sold Appellant a round trip ticket to Hong Kong for business purposes. Although Appellant returned to the United States in February of 1974, he had not yet completed his business abroad (1403-04). He returned to the United States only because he had not seen his family in three months; he had to attend to his business in Virginia; and he had to make some purchases here (1404). Appellant maintained that even when he had been in Hong Kong, he had made up his mind to return to the United States for a month and then return to Hong Kong on business (1404). Hence, on February 18th or 19th, which was a

*Appellant also presented two character witnesses in his behalf. Both JOSEPH YUAN and DANIEL GO, who were prominent businessmen, testified to Appellant's reputation for honesty (1379-1381, 1388).

few days after his return, he asked Lam to obtain another ticket for him for the end of March. He then gave Lam a $100 deposit towards the $1000 ticket (1406).

A few days before the March 12th meeting, Lam asked him if he wanted to make "lots of money" and told him about the two men who had money to buy drugs. When Appellant responded that he did not know anything about drugs, Lam replied that he didn't either, but they had nothing to lose by seeing the men (1414). Accordingly on March 12th, he and Lam met the two men. Lam introduced him as David Chan, which surprised him because he never used that name (1415). According to Appellant, Lam had to act as his interpreter since he spoke English only a "little bit" and could only understand the language if the person spoke very simple words and faced him (1418). Appellant then explained his conversation on the tapes. When he told Lam "You tell them that I came here to do business," he meant that he was here in the United States to conduct his import-export business (1419). When he referred to the word "connections," he meant only business connections (1419). He also told Lam that he did not know anything about drugs, but Lam failed to translate this particular statement to the two men (1423). Appellant also instructed Lam to tell the two men that they wanted to think it over since he had not yet made up his

mind to join any narcotic conspiracy from Hong Kong to the United States (1426-27). He had told Lam that they would not promise anything, but would just go and talk and at the conclusion of this meeting, he specifically said to Lam "Let's go back and think very carefully" (1427-29).

On March 19th, Appellant and Lam had another meeting with the two officers. Appellant again explained his responses on the Government tapes. Upon their discussion of the money to be paid, Appellant said to Lam "We don't have experience at all" (1423). Appellant additionally instructed Lam to tell the two officers that if they do it, it would be the first time. Lam, however, translated something that Appellant did not say (1427). Appellant additionally told Lam to tell the officers "Let's go back and think it over" (1428). When Appellant stated in reference to the 100 pounds that they dare not say whether they can really buy it or not since they were new to this, Lam failed to translate this and told the officers that Appellant only said "Things have been change in Hong Kong you know recently" (1444). When Appellant then stated to Lam that they could not promise that they could buy the stuff, Lam again incorrectly translated this and told the officers there would be no problem with the "stuff" (1446-47). According to Appellant, when he stated that buying was a problem and packing

was a problem, he meant that he could not promise anything (1447). When Wright asked if they would agree to the plan, Appellant responded "I am telling you now, we do not dare to say agree or not. We have to look at the situation on both sides. Do you dare to guarantee that you can buy 100 pounds." These statements, according to Appellant, meant that he still had to think about it (1449-51). Appellant denied ever telling Lam that he definitely agreed to the plan (1452). Where the tapes reflect Appellant telling Lam "Tell hi n definitely, I'll do it, definitely do it one time" he meant that if he , he would do it only once (1451-1453). Lam did not translate the word "if" (1453). At another point, Appellant stated "All we talk today is empty talk" (1456). This meant that nothing had been decided at this meeting (1456). There was no plan or agreement (1457). When he told Lam that he would call him, he meant that he would call Lam only if he decided to do it.

Appellant further testified that he did not call Lam from Hong Kong on April 1st. He did call him a few days later to tell him that he planned to do his own business there and that Lam should not come to Hong Kong because he did not want to do it (1464).

On April 7th, Lam telephoned him at his home in Hong Kong. He got very upset and asked Lam why he had come since he had already told him that he did not want to participate in any deal, and

that his brother had already left for China (1467). Lam told him not to get angry, but the two officers also came. Lam additionally said that he did not want to do it either, and that he did not have a source. However, since they had already spent so much time, they should at least attempt to get money from the two men (1467). Therefore, Lam requested him to come along and not pay anything (1467). Appellant decided that there would be no harm in going with Lam.

Accordingly, on April 18, 1974, Appellant went with Lam to the Hyatt Regency Hotel. Since the men talked primarily in English, Appellant did not understand what was being said with the exception of a few words (1468). On April 19th, they again went to the Hotel where there was a discussion concerning the money that Lam was trying to obtain (1469). And on April 20th, there was another conversation at the Hotel on the same subject. Lam thereafter told Appellant that the men would not give him any money (1470).

Appellant denied ever telephoning the officers and maintained that he knew nothing about narcotics in Hong Kong. Further, he did not see Lam after April 20th and on April 26th, he left Hong Kong himself (1495, 1501).

On cross examination, the following facts were elicited:

Appellant testified that after his arrest in August of 1974, he was taken to the office of Assistant United States Attorney James Nesland. An interpreter was present when Mr. Nesland asked him some questions (1529). Appellant denied telling Nesland that while in New York, he had agreed to go to Hong Kong to survey the area for heroin since he had to go there anyway (1537). Appellant was then asked the following questions:

> Q: Did Jimmy Lam introduce you to a person named Han Ng in Hong Kong in April?
>
> A: No.
>
> Q: Did Jimmy Lan tell you that a person named Han Ng was to be the source of supply for the heroin? (1551)

When counsel objected and asked for an offer of proof, the Government responded:

> Your Honor, the Defendant, Mr. Chung told Agent Gartland on August 20th that in April of 1974 David Chung met with Jimmy Lam and with an individual introduced to David Chung as Han Ng. David Chung told Agent Gartland that Han Ng was to be a source of supply for the heroin which was to be smuggled through Chung's business (1552).

Appellant promptly moved for a mistrial, claiming that the Government never furnished him with this particular statement made to Agent

Gartland (1552-53). According to counsel, the Government had represented that the Nesland statement was identical to any other statement (1553). When the Court overruled Appellant's objection, the Government stated that it would withdraw that question (1555).

The Government then proceeded to ask Appellant if he told Agent Gartland after he had been arrested that in Hong Kong Lam had been dealing with two different groups that were supplying heroin. Appellant responded "If it is possible, anything between me and Mr. Gartland, I refuse to answer" (1560).

At that juncture the Government informed the Court that it had decided not to ask the question and would have no objection to a curative instruction to the jury to disregard the question. The Government stated that Appellant had been given his Miranda warnings initially and had made the statements at a time when he was not in custody (1563).

Whereupon, Appellant's counsel informed the Court that on the day Appellant was arrested (August 21, 1974), he had to physically pull Appellant from the hands of Agent Gartland who had taken him down to the Magistrate's office. He specifically told the Agent that under no circumstance should he speak to his client in his absence. Subsequently, in April, Mr. Timbers telephoned him

and assumed that Appellant would plead guilty since he had attempted to co-operate with the Government. Therefore, the Government was prepared to sever his case after his plea of guilty. Counsel informed Mr. Timbers that Appellant had never advised him of this fact nor was he aware of any attempt on Appellant's part to co-operate (1565). According to counsel, he then sent for his client and learned that unbeknownst to him, a Special Agent of DEA had been talking to him, despite the fact that it was after indictment, after he had an attorney, and after the attorned had issued a specific directive that he did not want any conversations between this particular Agent and his client (1566). Moreover, counsel claimed that he had never received this particular DEA statement of August 21, 1974. Hence, counsel concluded that the Government had forced his client into properly refusing to answer a question and no instructions could cure this (1567). Whereupon, counsel requested a mistrial (1567).

The Government in turn responded that it believed that it turned over the August 20th statement and that this was the first time that he had heard of counsel's directive not to speak to his client (1568). Mr. Timbers additionally said that Agent Gartland had denied to him that this had occurred (1568).

The Court then stated that if it were the second or third day of the trial, it would not hesitate to grant a mistrial. Since the trial was in its fifth of sixth week, the Court decided to deny the motion, but it did instruct the jury as follows:

> There have been quite a few questions asked of this witness about statements that he made after he had been arrested and you are instructed to wipe any answer or any of those questions out of your minds to the extent that you can do it. I know it's difficult, but you are going to have to do it . . . because those statements are not binding on any other Defendant in this case.
>
> Furthermore, I instruct you that on the occasion when this witness refused to answer a question he was well within his rights in refusing to answer (1569, 1571).

At the conclusion of the case, Appellant's counsel again renewed his motion for a mistrial and specifically alluded to the acts of the Government in attempting to introduce statements allegedly made by Appellant without first providing counsel with a copy of said statements. Counsel contended that the statements were of such a nature that the Court could not correct them with a cautionary instruction (1613).

The Government stated that it was unclear whether the statements had been given to counsel, but maintained that it had asked the questions under the assumption that the material had in fact been turned over. The Government requested Appellant's counsel to look at its file, to which counsel agreed (1745).

GOVERNMENT'S USE OF TAPE TRANSCRIPTS

After the jury heard the recorded conversations of March 12, 1974, counsel objected to the fact that the jury still had the transcripts in front of them during the direct examination of Patrolman Ming. Counsel claimed that the transcripts were given to them only to assist them in listening to the tapes (205-06). The Court ruled that it would permit the jury to have the transcripts while questions were being put to the witness. The Government then proceeded to question Ming concerning specific pages of the transcripts (i.e., pp. 64, 79). Again, counsel objected to the Government's use of the transcripts (208).

Additionally, after the jury heard the recorded conversations of March 19, 1974, counsel protested that the jury still had the transcripts although the Government was now continuing with its direct examination of Ming. It was only after specifically questioning Min regarding certain pages of the transcripts, that the Government informed the jury that they could now put their copies down (249). At another point, Government, over Appellant's objections, directed the jury's attention to various pages of the transcript (259).

Finally, counsel was compelled to ask the Court whether the transcripts would be given to the jury when they retired to deliberate. Counsel stated that he was of the opinion that the transcripts had been admitted into evidence for the limited purpose of assisting the jury in listening to the tapes. The Government asserted that the transcripts were in evidence and therefore the jury could consider them in its deliberations. The Court then responded that it had not yet ruled on this (489).

At the conclusion of its charge, the Court did state that the transcripts were received in evidence solely to assist the jury in listening to the tapes (1807). After the jury commenced their deliberations, it requested to listen to both tapes in which Appellant participated (1809). The Court then decided that it would send the transcripts to the jury in order to determine which portions of the tape they wished to hear and the forelady could mark the transcripts accordingly (1810). Counsel objected to this and the Court responded that it was attempting to save time (1811).

Thereafter, counsel stated that at 1:00 p.m. the jury had been given the transcripts and it was now 4:46 p.m., and as far as he knew, the jury still had the transcripts in the jury room. The Court replied:

> How can I help it? I limited it to one copy and I gave certain instructions. I have leaned over backwards in this case (1823-24).

The Court then decided that if the jury wanted the transcripts, they could have them (1824).

VERDICT

The jury convicted all the Defendants of the conspiracy charge (1840) but was deadlocked on the second count of the indictment pertaining to the Defendant Ganoza (1842).

## ARGUMENT
## POINT I

### THE GOVERNMENT'S DELIBERATE USE ON APPELLANT'S CROSS EXAMINATION OF A STATEMENT WHICH WAS OBTAINED FROM HIM IN VIOLATION OF HIS RIGHT TO COUNSEL AND OF WHICH HIS COUNSEL HAD NO NOTICE OF ITS EXISTENCE DEPRIVED APPELLANT OF HIS DUE PROCESS RIGHT TO A FAIR TRIAL.

During Appellant's cross examination, the Government sought to question him regarding whether he had told Agent Gartland that Lam, while in Hong Kong, had been dealing with two different groups who were supplying heroin. The predicate for this question was a statement that Appellant allegedly made to Agent Gartland after his arrest and indictment in this case. Not only was counsel totally unaware of the existence of such a statement, but also he noted for the record that the statement had been elicited from Appellant in violation of his right to counsel. Under these circumstances, Appellant's refusal to answer the Government's question, albeit perfectly proper, had to have a devastating impact upon the jury, thereby rendering it impossible for him to receive a fair trial.

Unquestionably, Appellant's counsel was entitled to receive all pre-trial statements made by his client to any Government agent. United States v. Miranda, _F. 2d_ (2d Cir., decided 12/3/75);

United States v. Morell, 524 F. 2d 550 (2d Cir., 1975); United States v. Seijo, 524 F. 2d 1357 (2d Cir., 1974); United States v. Stewart, 513 F. 2d 957 (2d Cir., 1975); Brady v. Maryland, 373 U.S. 83 (1963). It is irrelevant whether the Government's failure to provide counsel with Appellant's statement to Agent Gartland was inadvertent or deliberate. In either case, Appellant's case was severely damanged by the fact that his counsel had no knowledge of its existence.

Rule 16(A) of the Federal Rules of Criminal Procedure explicitly provide that the defendant is entitled to inspect any written or recorded statement made by him and in the Government's possession. The purpose of this section is not only to inform the defendant of the contents of his statement so that he may explain his admissions, but to provide his counsel with information upon which he can base his trial strategy.

Because the Government failed to provide counsel with Appellant's statement to Agent Gartland, counsel could not properly prepare his client to answer any of the Government's questions in reference to this statement. But even more important, had counsel been aware of this damaging statement, he might very well have advised Appellant to refrain from taking the stand in his own behalf.

In the absence of such critical information, counsel could not make a knowledgeable decision regarding the appropriate trial tactic.

Moreover, had the Government turned over Appellant's statement as required by statute, counsel could have avoided the inherently prejudicial situation that developed at trial. When counsel learned of the existence of this statement, he immediately protested, stating that he had specifically warned Agent Gartland in no uncertain terms to refrain from speaking to his client in his absence. The acquisition of Appellant's statement by this Agent was in direct contravention of this order. Hence, the Agent's conduct in surreptitiously interrogating Appellant after his indictment and without the presence of his counsel, resulted in a blatant violation of his right to counsel. Massiah v. United States, 377 U.S. 201 (1964); Beatty v. United States, 389 U.S. 45 (1967); McLeed v. Ohio, 381 U.S. 356 (1965); United States v. Garcia, 377 F. 2d 321 (2d Cir., 1967); United States v. Accardi, 342 F. 2d 697 (2d Cir., 1965); United States ex rel. Lopez v. Zelker, 344 F. Supp. 1050 (S.D.N.Y. 1972). And any motion to suppress that Appellant would have made prior to trial on this ground would have undoubtedly been granted, thereby precluding the Government's use of this statement.*

*It matters not that upon learning of counsel's allegations, the court offered to hold a hearing. The damage had already been done and a hearing at that point would have been useless.

Considering all these factors, Appellant had every right to refuse to answer the Government's question in reference to the Gartland statement. However, his refusal served only to exacerbate the unfortunate, but highly prejudicial, situation into which the Government had forced him. The jury could now believe that Appellant had something to hide and was not being forthright on the stand. That one short answer, wherein he refused to answer the Government's question, was in all probability the clinching factor that secured his conviction.

What is particularly disturbing about the predicament in which Appellant found himself is that the Government had been forewarned of the impropriety of the statement obtained from Appellant by Agent Gartland. When the Government had previously questioned Appellant regarding one Han Ng, counsel requested an offer of proof regarding the basis for such a question. The Government in turn stated that Appellant had provided this information to Agent Gartland on August 20th. At this juncture, the Government was put on notice that counsel had not been given a copy of this particular statement. It is indeed incredible that the Government saw fit to withdraw the question concerning Han Ng, but then followed it up by another question based

on the very same statement. As soon as the controversy erupted concerning Appellant's refusal to answer the question, the Government again sought to withdraw the question. Such gaming tactics should be readily condemned in this, a criminal trial, wherein the threat of a conviction looms heavily over a defendant's head.

Nor can the Government extricate itself from this intolerable situation by claiming that the court's instructions to the jury obviated any prejudice that might have inured to Appellant. Notwithstanding the jury's inability to erase the occurrence from their minds, the court additionally conveyed to the jury its opinion that any instruction on this subject would be but a futile gesture. The court stated:

> There have been quite a few questions asked of this witness about statements that he made after he had been arrested and you are instructed to wipe any answer or any of those questions out of your minds to the extent that you can do it. I know it's difficult, but you are going to have to do it. (1517, emphasis supplied)

Significantly, it is difficult to reconcile the Court's reluctance to grant a mistrial because the incident occurred during the fifth or sixth week of trial in light of its statement that it would not have hesitated to grant a mistrial under the same circumstances if it were only the second or third day of trial. Regardless of when the incident occurred, the prejudice to Appellant's case remained the same. He certainly should not be required to bear the brunt of such a prejudicial maneuver by the Government merely because the incident took place at a later point in the trial.

Finally, the Government's conduct in compelling Appellant to assert what was tantamount to his privilege against self incrimination cannot be deemed harmless error. Appellant's connection with any conspiracy was at best tenuous. While Appellant might have considered entering such a conspiracy, that was as far as he went.

The tape recordings unequivocally show that although Appellant did enter some discussions regarding the importation of heroin, he never came to any decision as to whether he would actually do it. Instead, he constantly reminded Lam that they should only think about it. Furthermore, the fact that Appellant went to Hong Kong does not support the inference that he finally agreed to become a participant in the conspiracy. This was just another one of his many business trips there which had been planned well before his involvement in any conspiracy.

Regrettably, Appellant did not understand the complexities of the conspiracy doctrine. He simply was not aware that his mere discussion of an illegal scheme coinciding with his trip to Hong Kong would cast him as a defendant in this criminal trial.

Since this was the sum total of Appellant's involvement in the reputed conspiracy, the error complained of here cannot be construed as harmless.

## POINT II

THE TAPED CONVERSATIONS BETWEEN LAM AND APPELLANT SHOULD BE SUPPRESSED AS VIOLATIVE OF THE FOURTH AMENDMENT PROSCRIPTION AGAINST UNREASONABLE SEARCH AND SEIZURES SINCE THE RECORDINGS WERE MADE WITHOUT THE CONSENT OF THESE DEFENDANTS AND AT A TIME WHEN BOTH PARTIES ENJOYED A REASONABLE EXPECTATION OF PRIVACY.

During their two meetings in New York City, the two police officers clandestinely recorded their conversations with Appellant and Defendant Lam. Appellant is not raising any argument regarding the propriety of such a recording when at least one of the officers was privy to the conversation. Appellant, however, is raising serious objections to the recordings of conversations involving only him and Lam wherein both parties could have reasonably believed that their use of the Chinese langauge gave them an assurance of privacy and protected any of their discussions from being overheard. Hence, the officers' surreptitious recordings of these particular conversations constituted a gross invasion of Appellant's right to privacy and must be condemned as an unreasonable search violative of the Fourth Amendment. Katz v. United States, 389 U.S. 347 (1967); United States v. White, 401 U.S. 745 (1971); United States v. Kaufer, 406 F.2d 550 (2d Cir., 1969).

The United States Supreme Court in Katz, supra, emphatically stated that the Fourth Amendment may be utilized to protect an individual from any unreasonable surveillance even absent a showing of a physical trespass or seizure of property.

> Thus, although a closely divided Court supposed in Olmstead, (Olmstead v. United States, 277 U.S. 438 (1928)) that surveillance without any trespass and without the seizure of any material object fall outside the ambit of the Constitution, we have since departed from the narrow view on which that decision rested . . . [O]nce it is recognized that the Fourth Amendment protects people - and not simply "areas" - against unreasonable searches and seizures, it becomes clear that the reach of the amendment cannot turn upon the presence or absence of a physical intrusion into any given enclosure" supra, at p. 353.

It is submitted that the recording of conversations by the two officers, although not amounting to a physical trespass or a seizure of material, nevertheless, constituted an unreasonable seizure.

Nothing could be more offensive to an individual's right to privacy than what occurred in the present case. Appellant sought to attain a measure of privacy when he conversed with Lam in Chinese. He was apparently aware that the two officers did not understand this language and would thus be unable to overhear this

conversation. Moreoever, there is no indication on this record that Lam wished the officers to overhear his conversation with Appellant. Nor is there any indication that Lam or Appellant consented to the use of any eavesdropping devices. Clearly, sound recordings made in the absence or consent of any person privy to that conversation is inadmissible. Osborn v. United States, 385 U.S. 323 (1966); Berger v. New York, 388 U.S. 41 (1967); United States v. Kaufer, supra; Lopez v. United States, 373 U.S. 427 (1963).

While it is true that Appellant and Lam held their discussion in the same room as the two officers, rather than in a private room, this difference is not relevant to the issue of Appellant's rights under the Fourth Amendment. This was emphasized in the Supreme Court in Katz, supra when it stated:

> But this effort to decide whether or not a "given area," viewed in the abstract, is "constitutionally protected" deflects attention from the problem presented by this case. For the Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection . . . But what he seeks to preserve as private, even in any area accessible to the public, may be constitutionally protected. supra at p. 351 [emphasis supplied]

Hence, the issue in this case is whether Appellant was reasonably entitled to rely upon the privacy he thought he had attained by

conversing with Lam only in Chinese and it is contended that he was. Both he and Lam were under the impression that they were having a private discussion, since the two men knew that the officers did not speak Chinese. Therefore, because Appellant and Lam attempted to keep this conversation private and because they reasonably relied on the privacy they appeared to have, the secret recordings of their conversations constituted a blatant encroachment upon Appellant's right to privacy in direct contravention of the Fourth Amendment. Accordingly, this Court should suppress all recordings between Appellant and Lam.

## POINT III

### THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY PERMITTING THE JURY TO HAVE A COPY OF THE TAPE TRANSCRIPTS WHILE THEY WERE DELIBERATING ON A VERDICT.

Generally, the transcripts of tape recordings have been admitted into evidence for the limited purpose of assisting the jury in listening to the tapes. United States v. Bryant, 480 F.2d 785 (2d Cir., 1973); United States v. Greenberg, 445 F.2d 1158 (2d Cir., 1964); United States v. Kaufer, 406 F.2d 550 (2d Cir., 1969); United States v. Kabot, 295 F. 2d 448 (2d Cir., 1961); United States v. Tanner, 471 F. 2d 128 (7th Cir., 1972). This is the sole

function of the tapes and any use beyond this should not be sustained.

In this case, over vigorous objection, the jury was permitted to have access to the tape transcripts during their deliberations. Such a procedure resulted in a clear-cut violation of the best evidence rule. Certainly, the best evidence was the actual testimony or the tapes. If a jury is not permitted to take transcripts of the witnesses' testimony into the juryroom, it is difficult to reconcile permitting them to use tape transcripts at this critical time. The result in both situations would be the same. It precludes the jury from hearing or relying on the "best evidence" and that is the testimony itself or the actual tape recordings. It additionally prevents the jury from relying on its own recollection as to what the testimony was in reference to a particular subject.

That the use of the transcripts was particularly damaging to Appellant's case can be easily established. The tape recordings constituted the focal point of the Government's case against him. Portions of the recorded conversation established that Appellant was undecided as to whether he should join any conspiracy. To understand what really occurred during the two taped meetings, it was necessary for the jury to listen to the actual conversations. They

could not get the gist of these meetings from reading the cold transcripts. The fact that the jury requested to hear portions of the recordings involving Appellant reveal that they were troubled with his part, if any, in the conspiracy. At this critical point, they should not have been permitted to use the transcripts while deliberating on a verdict as to Appellant. If they had any further questions, the Court merely should have replayed the tapes. In this regard, it must be noted that the transcripts were given to the jury only as a time-saving device (1811). Appellant's right to a fair trial should not be sacrificed for the sake of expediency.

It is recognized that this Circuit has already sustained the procedure of permitting the jury to have copies of the transcripts during the trial and their deliberations. United States v. Carson, 464 F.2d 424 (2d Cir., 1972); United States v. Koska, 443 F.2d 1167 (2d Cir., 1971). Appellant submits that this Court should reconsider its position and adopt the viewpoint of the Eighth Circuit in United States v. John, 508 F.2d 1134 (8th Cir., 1975). In John, supra, the trial Court, before distributing the transcripts, carefully instructed the jury as to their limited use. It directed them to use

the transcripts only as aids in listening to the recordings and to base its verdict upon what was heard and not upon what was read. But more important, the transcripts were not made available to the jury during their deliberations. It is submitted that this careful and considered use of the tape transcripts should be adopted by this Circuit.

Accordingly, because the jury was permitted to retain a copy of the tape transcripts during their deliberations, Appellant's conviction should now be reversed and a new trial ordered.

## POINT IV

### THE REFUSAL OF THE TRIAL COURT TO SEVER THE POSSESSORY CHARGE LODGED ONLY AGAINST THE CO-DEFENDANT GANOZA FROM THE CONSPIRACY COUNT WHICH INVOLVED ALL THE DEFENDANTS DEPRIVED APPELLANT OF HIS DUE PROCESS RIGHT TO A FAIR TRIAL.

Appellant was not only forced to proceed to trial on a narcotic conspiracy charge, but also he had to endure the prejudicial effects of having the jury hear and see evidence pertaining to a drug possessory charge lodged only against his co-defendant Ganoza. Despite Appellant's motion for a severance at the outset of the trial, the Court apparently sustained the joinder on the strength of Fed. R. Crim. Proc. 8(a). This statute permits the joinder of

several crimes where the offenses are the same and are based upon the same acts or transactions, or if the transactions together constitute parts of a common scheme or plan. Based upon the facts of this case, the Court's failure to direct a severance deprived Appellant of his due process right to a fair trial.

At first, the Court was inclined to grant Appellant's motion for a severance. Unfortunately, at the behest of the Government's claim that a separate trial on the possessory count would be lengthy and repetitive of the evidence adduced here, the Court reversed itself. In finally denying Appellant's motion for a severance, the Court evidently was of the opinion that the right to a fair trial must be sacrificed for the sake of expediency, a conclusion which has never been sanctioned by our Courts. United States v. Nadler, 353 F. 2d 570 (2d Cir., 1965); United States v. Spector, 326 F. 2d 345 (7th Cir., 1963).

Compelling Appellant to be tried in a single trial on both the conspiracy charge and Ganoza's drug possessory charge gave the Government an undue advantage. Such a joinder unfairly permitted the Government to bolster its conspiracy charge against all the Defendants. The jury not only heard detailed evidence leading up to

and including the seizure of the heroin, but also the jury was permitted to view the heroin that had been seized from the Defendant Ganoza's apartment. Under these circumstances, the jury simply had to associate this contraband with the narcotics conspiracy that the Government was attempting to prove.

Although ordinarily a conspiracy count may be joined with the substantive offenses which are its objectives (James v. United States, 416 F. 2d 467 (5th Cir., 1969), the case should be otherwise where the effects of such a joinder are highly prejudicial to a particular Defendant. And such was the case with Appellant. As demonstrated in Point I, the evidence against Appellant was not overwhelming and a serious factual question was presented to the jury as to whether Appellant in fact agreed to participate in any conspiracy. The effect of introducing the heroin into evidence, albeit against Ganoza, concretized the Government's case as to Appellant. Prior to the introduction of this contraband, the jury could very well have assumed that Appellant was merely debating whether to join the venture. The tapes certainly support that conclusion. Moreover, up to the point of the seizure, there is nothing in the record to indicate that Appellant committed any overt act in furtherance of the conspiracy other than just discussing it. Even his trip to Hong Kong cannot be construed as an act in furtherance of the conspiracy since

Appellant was there for his own business purposes. However, irrespective or whether Appellant joined the conspiracy, there can be no question but that he abandoned it as of April 20th. The introduction into evidence of drugs, which were seized well after Appellant was no longer involved in any alleged scheme to import heroin into the United States, had to seriously prejudice his case. And the Court's instruction to the jury that this evidence was to be considered only against Ganoza did not obviate the prejudice inuring to Appellant. Once the jury viewed these drugs, there had to be a spill-over effect. The jury had to consider this contraband in deciding the close question of Appellant's culpability.

Finally, because there is sufficient evidence that Appellant abandoned the conspiracy in April and the drugs were not seized until May 30th, the conclusion should be drawn that the seized drugs were not part of a common scheme, or based upon the same acts or transactions as the original conspiracy charge so as to justify the joinder under Fed.R. Crim. Proc. 8(a). The Ganoza transaction was entirely separate from the conspiracy charge which the Government was attempting to prove at the trial. Hence, even under the statute, the joinder in this case should not be sustained.

In sum, it must be found that Appellant, by virtue of the joinder, was deprived of his due process right to a fair trial.

## POINT V

PURSUANT TO FEDERAL RULES OF APPELLATE PROCEDURE, RULE 28(i), ALL RELEVANT ARGUMENTS RAISED IN THE BRIEFS FOR THE CO-DEFENDANTS ARE INCORPORATED BY REFERENCE.

## CONCLUSION

FOR THE ABOVE STATED REASONS, APPELLANT'S CONVICTION SHOULD BE REVERSED AND A NEW TRIAL ORDERED.

February, 1976

RESPECTFULLY SUBMITTED,

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AFFIDAVIT OF PERSONAL SERVICE

STATE OF NEW YORK,
COUNTY OF RICHMOND ss.:

EDWARD BAILEY being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N.Y. 10302. That on the 17 day of Feb , 19 7 at No. 1 St Andrews Place, N.Y.C. deponent served the within Brief upon N. Katsoules the appellee herein, by delivering a true copy thereof to h personally. Deponent knew the person so served to be the person mentioned and described in said papers as the appellee therein.

Sworn to before me,
this 17 day of Feb 19 75

Edward Bailey

William Bailey

WILLIAM BAILEY
Notary Public, State of New York
No. 43-0132945
Qualified in Richmond County
Commission Expires March 30, 1978